Supreme Court of the United States

OCTOBER TERM, 1941

No. 1044

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

ROSE VIOLANO, Administratrix, and J. ALAN PARTRIDGE,

Petitionees.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN SUPPORT OF PETITION

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SUMMARY

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The issue involves a judicial restraint upon the police power of a state with respect to compulsory liability insurance for automobile drivers and affects a large number of people. *Wheeler* v. *O'Connell*, 297 Mass. 549. This restraint is not cured by the estoppel theory of the court below, *Stevens* v. *Blood*, 90 Vt. 81, 86. The restraint seems to be based upon a misconception of the statute requiring insurance or its equivalent and conflicts with its plain language and the interpretation of the District Court. *Texarkana* v. *Arkansas L. G. Co.*, 306 U. S. 188, 198.

II.

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The law of Vermont rather than a supposed intention of individuals measured the obligation of the Shelby Insurance Company (*Zabarsky* v. *Employers Fire Ins. Co.*, 97 Vt. 377; *Spaulding's Adm'r* v. *Mutual Life Ins. Co.*, 96 Vt. 67 at 80; *Lumbermens Mutual Casualty Co., of Ill.* v. *Timms & Howard*, 108 F. (2d) 497 (1939); *Personal Industrial Bankers* v. *Citizens Budget Co., of Dayton, Ohio*, 80 F. (2d) 327 (1935); *Eber Bros. Wine & Liquor Corp.* v. *Fireman's Ins. Co., of Newark*, 30 F. Supp. 412, (S.D. N.Y., 1939). But the opinion of the Circuit Court of Appeals subordinates the law to the supposed intention, disregarding the effect of the official "proof" of responsibility as a modification of the prior contract, which was susceptible of such modification. *Wood* v. *Rutland etc., Ins. Co.*, 31 Vt. 552; *Frost* v. *North British, etc.*,

Ins. Co., 77 Vt. 407, 417; *Powers* v. *Rutland R. R.*, 88 Vt. 376, 394, 395. Since the obligation of Shelby determines the obligation of petitioner, the decision of the Circuit Court of Appeals asserting petitioner's liability is in conflict with applicable Vermont decisions.

III.

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The opinion of the Circuit Court of Appeals ignored a statutory requirement of *"proof"* of financial responsibility and held that the existence of unproven responsibility, through other contingent and partial insurance, cut-down the liability of Shelby under the *"proof"* required by the statute. This is in conflict with administrative interpretation having the force of law (Re: *National Guard of Vermont*, 71 Vt. 493, 499; *Proctor* v. *Hufnail*, 111 Vt. 365, 369). This misinterpretation is one factor in the failure to subordinate expressions in contracts to statutory mandates.

IV.

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The decision emasculates the Vermont Statute dealing with financial responsibility of operators of automobiles, runs counter to the declared public policy of the State in this regard and denies to an insurer the equal protection of the laws,—this by denying petitioner insurer the right to rely upon the statutory "proof" of coverage filed by another insurer, while asserting that such right of reliance by others may exist.

Supreme Court of the United States

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY,
PETITIONER

VS.

ROSE VIOLANO, Administratrix, and J. ALAN PARTRIDGE,
PETITIONEES

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The facts have been set forth in the petition. The petition is based upon the claim that the Circuit Court of Appeals has in this case "decided an important question of local law in a way probably in conflict with applicable local decisions". This brief discusses first the importance of the decision and then the questions stated in the petition, in their order. The official opinion, review of which is sought, is printed as pages 203 to 212 of the official opinions for the October 1941 term. (123 F. (2d) 692.)

I.

The decision is important because it involves a judicial restraint upon the exercise of the police power of a state in a way likely to affect numerous persons.

The issue involved is the paramount control over contracts made with reference to the so-called Vermont Financial Responsibility Law. This law, P.L. 5190-5199, requires, as a condition of continued license to operate motor vehicles and continued registration of motor vehicles for use on the highway, proof of financial responsibility in such form (as the law stood at all times here material) as is satisfactory to the Commissioner of Motor Vehicles. A copy of the statute is appended. (Pp. 14-15.)

The statute is a limited form of compulsory insurance and operates under the police power of the state to protect those lawfully using the highways from the lack of financial responsibility of others acting negligently upon these highways to the common danger. While this statute only applies to persons previously connected with a specified negligent use of the highways, and an indemnity bond may be substituted for insurance, yet in principle it is the same type of public policy discussed in

> *Wheeler* v. *O'Connell*, 297 Mass. 549, 9 N.E. (2d) 544 (1937).

The opinion in that case quotes from the earlier *Opinion of the Justices*, 251 Mass. 569, 147 N. E. 681 (1925) justifying the statute on the basis of "the great uncompensated damage now caused by motor vehicles to innocent travelers upon the public ways." This is stated to be the fundamental basis of the statute.

Thus the decision in the instant case involves a public policy with respect to a large aggregate volume of tort damage.

The decision of the Circuit Court of Appeals seems to recognize that its substitution of contract for statutory measure of liability leaves unprotected the victims of accidents and, for discussion, assumes that an insurer could be held liable in favor of the victim beyond the limits of its policy by some estoppel. Such an estoppel could at the most protect a victim who had knowledge of the certificate before the accident and acted in reliance upon it.

> *Stevens* v. *Blood*, 90 Vt. 81, 86, 96 Atl. 697, 699 (1916) and cases cited.

Obviously such a theory offers no general public protection.

It may be noted in passing that in the instant case the coverage by Shelby was stipulated July 16, 1934,[1] was conformed to Vermont law by indorsement July 17, 1934,[2] the certificate by Shelby that it had issued a policy covering damages while Alan was operating any car but his own was executed July 24, 1934[3] and was filed the next day. When application was made to Farm Bureau for statutory coverage of Arthur[4] (August 4, 1934) with respect to his car here involved, he told the agent for Farm Bureau that Shelby had already insured Alan as an operator.[5] Farm Bureau had a right to rely upon his assurance and to act upon it in the belief that, in filing financial responsibility for Arthur and permitting the continued registration of his car, it was not granting insurance to Alan while operating that car, because Alan was otherwise insured and thus excluded from the omnibus clause of Farm Bureau's policy. As to Farm Bureau, therefore, under the Vermont decision above stated, estoppel might apply. But it would not apply with respect to the general public. Thus, so far as the opinion of the Circuit Court of Appeals tends to minimize the importance to the public of its decision, it takes a position in conflict with applicable local decisions.

The Circuit Court of Appeals appears to have otherwise misinterpreted the statute in such a way as to reduce its effectiveness for the opinion gives evidence that the Court considered and determined the case upon the theory of car coverage rather than individual liability coverage. That court seems to have had doubt that operator coverage was required by the statute but "assumes as the commissioner and parties seem to have assumed that J. Alan was obligated to prove his responsibility as an operator of any cars he might drive." (Official Opinion, p. 206; 123 F. (2d) 692, 694.) This assumption of course follows the finding of the District Court

[1] Pl. Ex. 3 (opp. R. 250), 5th page; R. 122, 236.
[2] Ibid., 6th page.
[3] Def. Ex. J, opp. R. 251; R. 228.
[4] Pl. Ex. 3 (opp. R. 250), 7th page; R. 122, 236.
[5] R. 236.

(R. 235)[6] and is the state interpretation of the law. But subsequently in the opinion of the Circuit Court of Appeals it is said:

> "Shelby's Auto 1 S, therefore did not insure the Ford coach. . . ."
>
> "Nor was the coverage extended by Shelby to the Ford coach by virtue of the second Rider Auto 1 S."
>
> (Official Opinion, p. 209; 123 F. (2d) 692, 695.)

In fact it is apparent that under the administrative interpretation by the state officials (which is in the circumstances controlling, see infra III) and the interpretation of the District Court, to which this court looks,[7] the insurance coverage of an operator when required by the Vermont Financial Responsibility Law is not measured by vehicles operated but by the liability of the assured to respond in damages for his negligence.

The questions presented by this case therefore involve a public policy affecting seriously a considerable group of people; they are therefore important.

II.

Under applicable Vermont decisions Shelby's coverage was as defined by the statute and its certificate, rather than by its prior private agreement.

(A) The statute requires *proof* of Financial Responsibility. The requirement is absolute, not conditional. (P.L. 5190 et seq.)

(B) The certificate filed[8] is absolute in terms, subject only to an exception, not here material, authorized by the Commissioner and not in violation of law.

(C) (1) When the Shelby Company interposed itself as the insurer certifying its liability coverage as co-extensive with the act

[6] *Cf. Texarkana v. Arkansas L. G. Co.*, 306 U. S. 188, 198; 59 Sup. Ct. 448, 453 (1939).
[7] *Texarkana* v. *Arkansas L. G. Co.*, supra.
[8] Def. Ex. J, opp. R. 251; R. 228.

(except as aforesaid), the law defined the extent of this coverage. The law became a part of and controlled the contract of insurance.

This is established by the decision of the highest court of the State of Vermont, in *Zabarsky* v. *Employers Fire Ins. Company,* 97 Vt. 377, 123 Atl. 520 (1924).

In that case, where the statute prescribed requirements for an insurance contract, it was held that the statute controlled conflicting provisions of the policy and furnished the measure of rights and obligations of the parties. (*Id.* at page 380-381.) The principle is equally applicable to the present variation in scope of coverage.

That decisions of the Vermont Supreme Court subordinate intention to statutory requirements is apparent from language used by that court in *Spaulding's Adm'r.* v. *Mutual Life Ins. Co.,* 96 Vt. 67 at 80, 117 Atl. 376 at 381 (1922), where it is said with respect to papers connected with the policy,

> "We have no statute affecting the question, so it is to be determined by the intention of the parties as expressed in the contract."

Such of course is the general rule.

> *Lumbermen's Mutual Casualty Co. of Ill.* v. *Timms & Howard,* 108 F. (2d) 497 (1939).
> *Personal Industrial Bankers* v. *Citizens Budget Co., of Dayton, Ohio,* 80 F. (2d) 327 (1935).
> *Eber Bros. Wine & Liquor Corp.* v. *Fireman's Ins. Co., of Newark,* 30 F. Supp. 412 (S.D.N.Y., 1939).

The Circuit Court of Appeals, on the contrary, subordinated the law and the proof required by law, to qualifications and exceptions written in the policy, Rider Auto 1 S. Thus that court "decided an important question of local law in a way probably in conflict with local decisions" within the terms of the Supreme Court Rule 38.

The Circuit Court of Appeals was determining the issue probably in conflict with applicable Vermont decisions when it in effect held that the Rider Auto 1 S was unaffected by the certificate issued by Shelby. While in any circumstance the mandatory statute must furnish the rule of decision, the certification by Shelby considerably after the execution of the endorsements amounted to a contractual variation of these endorsements. They were not changed physically but it was certified that the insurance covered the operation of all cars except those of Alan Partridge. This not only raised a statutory obligation but was an amendment of the prior contract.

In *Wood* v. *Rutland, etc., Ins. Co.*, 31 Vt. 552 (1859), a policy issued to A and B, as partners, on existing goods was held amended by oral agreement so as to constitute insurance to A alone with respect to after acquired goods.

The doctrine of amendment of written contracts by subsequent agreement, even oral, was again applied to an insurance policy in

> *Frost* v. *North British, etc., Ins. Co.*, 77 Vt. 407, 417; 60 Atl. 803 (1905).
> See also *Powers* v. *Rutland R. R.*, 88 Vt. 376, 394-395; 92 Atl. 463, 470 (1912).

Here the certificate is signed by the party to be bound and assented to by the other party to the contract through retention of the license not otherwise available. To restrict the scope of this certificate to the terms of an endorsement previously made not only subordinates statutory mandate to prior intention of the parties, but ignores the principle of contract modification established by applicable Vermont decisions.

In either aspect the decision of the Circuit Court of Appeals is in conflict with applicable local decisions and reviewable in the Supreme Court.

III.

Shelby's obligation under its certificate of coverage is not reduced or modified by the existence of other uncertified coverage, if any.

The opinion of the Circuit Court of Appeals is based upon the theory "that the Financial Responsibility Law did not . . . . require, (Shelby's coverage of Alan's liability while driving a car covered by Farm Bureau liability insurance to Arthur) since protection was already available to J. Alan by the omnibus clause of the Farm Bureau policy." (Official Opinion, p. 210; 123 F. (2d) 692, 695.) But Farm Bureau had not filed any proof of Financial Responsibility with respect to Alan. He was not named in its policy or in its certificate of responsibility of Arthur[9]. That certificate was expressly stated as covering the liability of Arthur "as owner" of the described vehicle. There was therefore no proof of Financial Responsibility with respect to Alan's liability for accident while operating Arthur's car, unless and except the certificate filed by Shelby covering the operation of all cars other than those belonging to Alan himself. Any such car could not be registered without insurance to him applicable to it.

(A) Section 5190 of the Public Laws of Vermont above referred to required not merely existence of financial responsibility to satisfy "any claim for damage by reason of personal injury to or the death of any person," but it required "*proof*" of such responsibility "satisfactory to the commissioner." (P. L. 5193.)

Defendant's Exhibit J[10] shows the scope of the proof required as the law down to 1937 was interpreted. It shows that the proof must extend to "the legal liability of the named assured for accidents which occur while any motor vehicles other than a motor vehicle owned in full or in part by the named assured is being driven personally by the named assured within the boundaries of

[9] P. Ex. 4 (opp. R. 250), 7th page; R. 131, 235.
[10] Opp. R. 251; R. 228.

the State of Vermont." The scope and basis of the exceptions is evident. If the insured operator owned a motor vehicle it could not be registered for operation unless he filed proof of financial responsibility of himself as owner with respect to damage caused by that vehicle. The exception therefore merely excluded damage as to which the operator was otherwise covered as a named assured whose financial responsibility was otherwise proved to the commissioner[11]. Thus the proven responsibility was all inclusive and was absolute and not contingent.

After this interpretation by the Commissioner of Motor Vehicles, by legislative enactment amending other provisions of the law (Section 1 of No. 76 of the Acts of 1929), the legislature re-enacted the requirement of "proof of financial responsibility to satisfy any claim for damages, by reason of personal injury or the death of any person." This language was again included in the enactment of the statute in connection with the general revision of 1933; and the pre-existing law requiring the proof to be such "as shall be satisfactory to the Commissioner" also was re-enacted there without change. There is thus presented an administrative interpretation and determination of the scope of the proof, confirmed by legislative re-enactment in the same language, continuing at all times material to this litigation. This interpretation has substantially the force of judicial decision.

The Supreme Court of Vermont in following the interpretation of a statute by the executive has said:

> "It is a well-established principle of law that the contemporaneous construction of a statute by the executive officers of a government, whose duty it is to execute it, is entitled to great weight, and should not be disregarded nor overturned, except for cogent reasons, and unless it is clear that such construction is erroneous. *Heath v. Wallace*, 138 U. S. 573."
>
> *National Guard of Vermont*, 71 Vt. 493, 499; 45 Atl. 1051, 1053 (1899).

[11] By Section 1 of No. 81 of the Acts of 1937 the proof of Financial Responsibility was required to cover the operations of any and all motor vehicles operated by him.

Here the commissioner was required to exact proof and the character and measure of that proof was discretionary with him. His actions in the circumstances are binding upon the courts. The Vermont Supreme Court has recently said:

> "If the duty is one that necessarily involves an inquiry of fact and an exercise of judgment on the case presented, it is not ministerial but discretionary and the disposition of it made by the official will be binding upon the courts."
>
> *Proctor* v. *Hufnail*, 111 Vt. 365, 369; 16 A. (2d) 518, 520 (1940).

Thus the record shows that the Commissioner of Motor Vehicles required of an operator proof covering his Financial Responsibility with respect to the operation of all cars except those owned by him. It did not except from this proof cars owned by another otherwise insured under some policy which might protect the operator by some omnibus clause, if any. This requirement of the commissioner, thus defined with the effect of a judicial decision binding upon the courts, establishes the extent of the operations assured by a certifying insurer of an operator. Since the decision of the Circuit Court of Appeals in effect holds that the evidence of other contingent coverage of the liability of an operator required to file proof of Financial Responsibility cuts down the obligations certified by the proof, it determined an important question of law in conflict with applicable decisions of the state courts.

This misinterpretation of the requirement of the Vermont Financial Responsibility Law is but a single factor in the fundamental error of the Circuit Court of Appeals. The basic error in the decisions of that court is its failure to subordinate the intent of the parties, which it determines was evidenced by the endorsement Auto I S of July 16, 1934, to the statutory mandate, to the operation of which Shelby voluntarily submitted itself. Under the applicable decisions of Vermont courts the obligation of

Shelby was thereafter determined by the statutory mandate rather than by the intent of the parties—if the parties did not intend the coverage by Shelby to be co-extensive with the statutory liability.

IV.

The decision violates the public policy of the state upon a matter of internal police by a fundamental conflict with applicable local decisions.

The decision of the Circuit Court of Appeals emasculates the Vermont Financial Responsibility Statute. That statute not only contemplates that after specified types of accidents no person shall operate a car upon the highways unless he is responsible for damage which he may occasion thereby, but the statute expressly requires that this responsibility shall be established by proof. The proof required under the law is proof which furnishes record evidence as to the assurer or surety available for recourse. The interpretation by the Circuit Court of Appeals destroys the certainty of that record. It leaves the damaged person uncertain as to liability to pay his damage. Thus the opinion defeats an important element in the public policy of the state as to this subject.

The suggestion of the Circuit Court of Appeals that one injured might secure redress by means of estoppel does not lessen the vice of the situation created by its decision. It substitutes uncertainty for the certainty contemplated by the statute. And it is based upon the supposed effectiveness of a theory of legal liability supported by a species of supposed estoppel which is in conflict with the Vermont decisions. The decision of the Circuit Court of Appeals holds out to persons supposedly protected by the law only an elusive hope. It denies even that to another insurer who acts in reliance upon the obligation established by law. Thus it deprives another insurer of equality before the law.

These are considerations which characterize the evil effect of

the decision review of which is sought. But at the foundation of that decision is the concept that the intention of the parties, as expressed at an earlier date, controls the obligations imposed by law at a subsequent date as the result of the subsequent acts of those parties. In this the decision is squarely in conflict with applicable decisions of the Vermont Courts upon a question of local law which is controlling of this case.

Respectfully submitted,

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MOTOR VEHICLE INSURANCE

Financial Responsibility

Sec. 5190. *Security for damages; conditions; failure to furnish.* The commissioner shall require proof of *financial responsibility to satisfy any claim for damages,* by reason of personal injury to or *the death of any person,* of at least five thousand dollars for one person and ten thousand dollars for two or more persons killed or injured and one thousand dollars for damages to property *in any one accident,* as follows:

I. From the *owner and operator of a motor vehicle involved* in an accident when the operator of the vehicle, as a result of such accident, is convicted of a violation of section 5110, sub-sections I, II, III, IV, V, or VIII or is convicted of a violation of sections 5140, 5149 or 5156, but this provision *shall apply to an owner only when his motor vehicle, at the time of the accident, was being operated by himself, a member of his family, his employee, or agent;*

II. From a person who is convicted of a violation of sections 5153, 5159 or 5160;

III. From the *owner and operator of a motor vehicle* which is involved in an accident in which a person is killed or injured or from which damage to such motor vehicle or to any other property to the extent of seventy-five dollars or more results, when it appears to the commissioner, after full investigation, that the operator of the vehicle was at fault; but this provision shall apply to an owner only when his motor vehicle, at the time of the accident, was being operated by himself, a member of his family, his employee or agent;

IV. From a person against whom there is an outstanding unsatisfied judgment of a court of competent jurisdiction within this state for damages arising out of a motor vehicle accident and based upon any violation of the provisions of part I of this title.

Sec. 5191. *Coverage; failure to furnish proof.* Proof of *financial responsibility* shall cover and extend *to all motor vehicles owned by a person.* If he shall fail to furnish such proof within twenty days after notice from the commissioner is mailed to him, the commissioner shall, until such proof is furnished, suspend the license of such person and suspend the registration of any or all of the motor vehicles registered in the name of such person, or refuse thereafter to register a motor vehicle owned by or subject to the control of such person, or if such person is not a resident of this state, suspend the right of such person to operate or cause to be operated any motor vehicle in this state owned or controlled by him, or refuse to register a motor vehicle transferred by him unless it shall appear to the satisfaction of the commissioner that the transfer is a bona fide sale.

Sec. 5192. *Proof to be kept in force.* After a person has been required to file proof of financial responsibility, he shall not thereafter be entitled to a renewal of his license nor again to *register a motor vehicle* owned or controlled by him, unless such proof of a renewal thereof is kept on file and in force, except as provided in section 5199. This shows intent to cover vehicle.

Sec. 5193. *Method of proof. Such proof* of financial responsibility shall be furnished as shall be satisfactory to the commissioner and *may be* evidence of the insuring of such person against public liability and property damage in an insurance company, authorized to do business in this state, in the amounts specified in the third preceding section, provided the policy of insurance *shall be non-cancellable* except after ten days' notice to the commissioner of ; or such proof may be the bond of a surety company, authorized to transact business in this state, *which bond shall be conditioned for the payment of* such amounts.

Sec. 5194. *Waiver of defenses against injured party.* When evidence of the insuring of a person, convicted of a violation of a motor vehicle law within the terms of part I of this title, is offered as proof of financial responsibility, the commissioner shall not ac-

cept the same unless the policy of insurance or indemnity bond has attached thereto a certificate waiving, as against injured persons, all defenses based on false representation or breach of warranties as set forth in the application for the policy of insurance or indemnity bond by the insured. *Such contract, bond, or policy of insurance* shall be for the benefit of any person injured in person or property, *to the amounts indicated therein, to satisfy the legal liability of the insured.*

Sec. 5195. *Additional evidence.* Additional evidence of financial responsibility shall be furnished the commissioner at any time, upon his request therefor.

Sec. 5196. *Bond.* The bond shall be held by the commissioner to satisfy an execution issued against such person in a cause arising out of damage caused by the operation of a motor vehicle owned by such person.

Sec. 5197. *Abstract of record; fee.* Upon the request of an insurance or surety bond company, the commissioner shall furnish such company a certified abstract of the operating record of a person subject to the provisions of this chapter, and, if there shall be no record of a conviction of such person of a violation of a provision of a statute relating to the operation of motor vehicles or of any injury or damage caused by such person as herein provided or of the suspension or revocation of the license of such person, the commissioner shall so certify. The commissioner shall collect for the benefit of the state for a certificate the sum of one dollar.

Sec. 5198. *Return of number plates; penalty.* A registrant whose certificate of registration is suspended as provided in this chapter shall immediately return to the commissioner his certificate of registration and the number plates issued thereunder. If a person shall fail to return to the commissioner the certificate of registration and the number plates issued thereunder as provided herein, the commissioner shall forthwith direct an enforcement

officer to secure possession thereof and to return the same to the office of the commissioner. A person failing to return the certificate and number plates shall be fined not more than twenty-five dollars.

Sec. 5199. *Waiver.* The commissioner may relieve a registrant from further continuing the bond or policy after three years, provided that during that time he has not been convicted of a violation of a provision of the motor vehicle laws and provided no suit or judgment arising *out of the operation of a motor vehicle* shall then be outstanding against him, and provided he has not suffered a suspension or revocation of his license or right to operate motor vehicles.

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Petitionees.

PETITIONEES' BRIEF IN OPPOSITION TO PETITION

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SUMMARY

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The issue of judicial restraint upon the police power of the State of Vermont is not involved. The only issue involved is the interpretation of liability insurance contracts under local law. The Vermont Financial Responsibility Law does not give the Commissioner of Motor Vehicles power to change the terms of an insurance contract.

II.

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The Vermont law is written into the Statute only to the extent set forth in subd. (a), (b), (c) and (d) of the Statement. Otherwise, the intention of the parties governs. To uphold Petitioner's contention would be to emasculate the Statute P. L. 5191 by which the proof "covers and extends" to the motor vehicle itself and which is for the benefit of the injured person. Couch on Ins. Law, Vol. 5, p. s. 1175g n. 8, Boyle v Manufacturers L. Ins. Co., 96 N. J. L. 380; American Fid. Co. v Big Four Taxi Co., 111 W. Va. 462.

III.

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The opinion of the Circuit Court correctly interprets P. L. 5193 for this Statute only requires proof that the insurance or other security has been provided. The Commissioner has no power to change the law. Heath v Wallace, 138 U. S. 573.

IV.

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The decision guards the public policy of Vermont which is to protect persons injured by the negligent operation of automobiles by persons who have previously violated the law. Wheeler v O'Connell, 297 Mass. 549, 552.

Supreme Court of the United States

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY,

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PETITIONEES

OBJECTIONS OF PETITIONEES TO PETITION FOR WRIT OF CERTIORARI

Statement

1. This is an appeal by Farm Bureau Mutual Automobile Insurance Company, hereinafter called "Farm Bureau," from a judgment of the District Court of the District of Vermont, holding it liable to pay, to Rose Violano, Admrx., the sum of $10,155. because of a judgment recovered by her in the sum of $12,000. and costs of $155 against J. Alan Partridge, hereinafter called "J. Allan," for negligently killing her husband on November 18, 1934 while driving a Ford coach automobile belonging to J. Arthur Partridge, father of J. Alan, herein called "J. Arthur." J. Alan was insured against liability to the amount of $10,000. under the omnibus provisions of Farm Bureau policy No. 639-214 (pages 9-13 after R. 250) issued to J. Arthur (R. 235, 236) and for expenses of his legal defense, (R. 236). Petitioner was ordered to pay to J. Alan the sum of $3,160.21 as damages for the costs of his legal defense and confinement in jail, plus interest on these sums (R. 239, 240). The omnibus provisions of the farm Bureau policy "extended xxx to any person xxx while xxx operating (the Ford coach) provided xxx such xxx operation is with the permission of the named assured," (J. Arthur). J. Alan was

driving the Ford coach with the permission of J. Arthur, (R. 235), and was then insured for $10,000 under this extended coverage, ***unless*** this coverage was void because it excludes therefrom, as Farm Bureau claims, any coverage of J. Alan by the provisions of the omnibus clause, which excludes from coverage, "any person x x x other than the Named Assured x x x covered by other valid and collectible insurance against a claim also covered by this policy." Farm Bureau asserts J. Alan was covered by "other valid and collectible insurance" issued by "Shelby Mutual Plate Glass and Casualty Company, hereinafter called "Shelby," under riders Auto 1-S and Auto 5-S attached to Shelby policy, Plff's No. 3 which appears after R. 250.

2. The Decision of the Facts appears at R. 235-237 and of the Law at R. 237-240. The circumstances concerning the issue of these policies are as follows:—

(a) Because of negligent operation on June 26, 1934 by J. Alan of a Ford truck, owned by J. Arthur, the Commissioner of Motor Vehicles of Vermont thereinafter called "Commissioner," in obedience to P. L. 5190 subd. I and III and other provisions of the Financial Responsibility Law of Vermont, Public Laws of Vermont ss. 5190-5199, required proof of Financial Responsibility from J. Arthur as owner thereof for $10,000 for public liability and from J. Alan as the operator of said vehicle for $5,000., to one person. Farm Bureau policy was in effect from February 22, 1934 to February 22, 1935. J. Arthur insured under Shelby policy from May 1, 1934 to May 1, 1935 a Ford truck. In order to procure insurance covering his minor son, J. Alan, as operator of motor vehicele other than those owned by himself, which were already insured, three by Farm Bureau and the Ford truck by Shelby, he purchased such additional insurance from Shelby and had a rider, dated July 16, 1934, (Auto 1-S) attached to the Shelby policy. (5th page after R. 250. The coverage provided by the Shelby rider was made to conform with the provisions of the Financial Responsibility Law of Vermont by rider Auto 5-S on the Shelby policy, dated July 17, 1934, (6th page after R. 250).

(b) Shelby filed proof of Financial Responsibility with the Commissioner on July 25, 1934 for J. Alan, by certificate dated July 24, 1934, Deft's Ex. J. (See page of Record before p. 251).

(c) On August 9, 1934, J. Arthur as owner of the Ford coach, purchased from the Farm Bureau financial responsibility coverage for the Ford coach, and filed with the Commissioner a certificate of Financial Responsibility as owner of the Ford coach as "Proof of Financial Responsibility" under Farm Bureau policy required by P. L. 5190-5191, (Plff's Ex. 4, p. 7 after R. 250) and at the time informed Farm Bureau, through Carr, its agent, that Shelby had already insured J. Alan for driver coverage. (R. 195, R. 236).

3. The Farm Bureau made divers offers of settlement to the Administratrix from $1500 on March 23, 1937 to $4000. on June 26, 1937, none made to J. Alan or J. Arthur (R. 236-237).

4. The premium charged by the Shelby for the coverage for J. Alan totaled $5.60 (R. 133, 135 and Auto 1-S) but if this insurance had been carried for a full term of one year the charge would have been $7.00 (R. 135), ***but if there had been no other insurance covering the trucks and motor vehicles of J. Arthur*** the charge made by Shelby for the period of one year for J. Alan would have been ***about $61.00*** (R. 135.) When Shelby wrote Auto 1-S, Shelby's agent, Mr. Drew, had knowledge of the coverage of the other cars and trucks owned by J. Arthur by Farm Bureau. (R. 135, R. 133 lines 17-19).

5. The Petitionee contends that Petitioner has waived and is estopped to assert non-coverage by the acts pointed out in Title I (G) hereof.

I.

THERE IS NO JUDICIAL RESTRAINT ON THE EXERCISE OF THE POLICE POWER OF THE STATE OF VERMONT

(The pertinent statutes of Vermont 5190-5199 appear at pp. 14-17 of Petitioner's brief).

(a) The opinion of the District Court (R. 237-238) holding that the coverage of the Shelby policy was excess insurance, in any event, and did not insure against a claim covered by the Farm policy is sound.[1]

1 Grasberger v Liebert & Obert, 7 Atl. (2nd) 925, 122 A. L. R. 1201: Continental Gas Co. v Curtis Pub. Co., 97 F (2nd) 710, 711.

Petitioner attempts to make its case by contending (its Brief p. 5) that by Deft's Ex. J. Shelby's coverage of J. Alan under the Financial Responsibility Law, ***conformed*** to Vermont law, but the conformation was only to the extent set forth in paragraphs (a), (b), (c) and (d) of the Statement, for this was merely "proof" as required by P. L. 5193 that the Shelby policy covered J. Alan when operating motor vehicles "other than a motor vehicle owned in full or in part by the Named Assured," as provided for by Deft's Ex. J. Therefore, even under this claim of conformation, J Arthur's motor vehicles were excepted, for he was the Named Assured in the Shelby policy No. 26418 (p. 1 of policy). The issuing of "proof" merely is evidence of insurance, and is not a contract. The contract is the policy, except as changed by the provisions mentioned in (a), (b), (c) and (d) of the Statement herein.

By P. L. 5190 subd. I and III proof was required by J. Arthur as owner when his automobile was involved in an accident when operated "by a member of his family" and by P. L. 5191 this "proof" extended to and covered the motor vehicle, and by filing "proof" of this coverage satisfactory to the Commissioner as required by P. L. 5193 the coverage of the Petitioner's policy was not reduced.

(B) By Auto 1-S (which appears after Shelby policy) the automobiles owned by J. Arthur were excluded by the clause therein which reads "except x x x (1) an automobile x x x owned in whole on in part by such relative (J. Alan) or any member of his household." The words "his household" mean J. Arthur's household, as J. Alan lived with J. Arthur.[2]

Shelby, for the coverage of Auto 1-S charged on the basis of $7.00 for one year, whereas, the charge for this period would have been $61.00 for this coverage if J. Alan had been insured for the driving of all motor vehicles under this coverage. (See par. 4 of Statement). In the foregoing circumstances there can be no question but that the contract of Shelby under Auto 1-S and Auto 5-S excluded the automobiles owned by J. Arthur from coverage.

2 Cartier v Cartier, 84 N. H. 425; Home Ins. Co. v Peterson, 225 Ala. 487; Instant case, 123 F. (2nd) 692, 695.

(C) As stated at p. 210 of the Official Opinion, there is, of course, no statutory requirement that all risks or moieties thereof be covered by the same insurer and J. Alan had the right to cover his liability as operator of his father's vehicles under the omnibus coverage of J. Arthur's policies, and his liability while operating vehicles other than those owned by J. Arthur under Shelby's coverage, Auto 1-S and Auto 5-S.

Farm Bureau is not in the position of a judgment creditor favored by P. L. 5194 as the Circuit Court correctly held, 123 F (2nd), 692, 696 (7, 8).

(D) In view of the provisions of the second paragraph of rider, Auto 5-S, whereby :

> "The assured or any other person covered by the policy agrees to reimburse the Company for any payment made by the Company on account of any accident, claim or suit involving a breach of the terms or conditions of this policy, which payment the company would not have been obliged to make under the provisions of this policy except for the agreement contained in the foregoing paragraph.",

even if Auto 5-S and the filing of Deft's Ex. J enlarged the coverage beyond the scope of the contract provided for by Auto 1-S. J. Arthur and J. Alan obtained no insurance by virtue of this enlargement for, they were bound to repay the amount of the enlarged coverage to Shelby under Auto 5-S.

(E) Under the rule of construction stated in Jacobs v. Nat. Acc. & H. Ins. Co., 103 Vt. 5, 9 the words "is covered" in the provisions of the omnibus clause of the Farm Bureau as to other insurance refer to insurance then in existence and do not operate prospectively, hence did not cover insurance coming into existence later covering a claim also covered by the Farm Bureau policy.[3]

(Note : The Courts below did not find it necessary to resort to this ground).

(F) There was no "other insurance", because by the provisions of Auto S-1 "the coverage provided by this endorsement shall be excess insurance over and above the amount of such other valid and collectible insurance," and the Farm coverage was, in any

3 Spaulding, Admr. et al v M. L. Ins. Co. of N. Y., 96 Vt. 67, 80; Brink v Merchants & Mechanics Ins. Co., 49 Vt. 442, 445.

event, primary insurance because the two policies did not cover the same interests in the same property against the same risks and in favor of, or for the benefit of the same person, which conditions must concur in order that there be other insurance.[4]

(G) Even if the Farm Bureau's contentions made in its petition are sound, it still is liable, for it waived the forfeiture provisions of said omnibus clause, in the following manners:—

(1) By filing certificate of Financial Responsibility for J. Arthur (Plff's Ex. 4 p. 7 after R. 250), with knowledge that Shelby had insured J. Alan for driver coverage. (R. 195, R. 236).[5]

(2) By assuring J. Alan it would defend him after it had knowledge of the accident (R. 102 lines 16-25). Bardwell case supra. (Note: The Courts below did not find it necesary to resort to this ground.)

(3) Requiring assistance of J. Alan concerning the accident (R. 103). Bardwell case supra. (Note: The Courts below did not find it necessary to resort to this ground).

(4) By failing to notify J. Alan seasonably of its disclaimer, that is on October 27, 1936 (R. 115-116) though it had immediate knowledge of the accident.[6]

(Note: The Courts below did not find it necessary to resort to this ground).

(5) By making offers of settlement from $1500. on May 23, 1937 to $4000 on June 26, 1937 to the administratrix (R. 236-237), which offers were prejudicial to the assured.[7]

(H) Policies issued under statutes such as those involved in this cause are deemed to be for the benefit of the public and ***cannot be affected by legal rights or equities between the insured and insurer,*** and Farm Bureau is therefore liable regard-

4 Cooley's Briefs on Ins. Law and supp. s. 2871; Couch on Ins. Law, Vol. 5, s. 1039.

5 Bardwell v Comm. Union Assur. Co., 105 Vt. 106, 114, (7)

6 Bates v German Comm. Acc. Co., 87 Vt. 128, 131.

7 Pellon et al v Conn. Gen .L. Ins. Co., 105 Vt. 508, 522; Bates v German Comm. Acc. Co. supra at p. 131; Davidson v American Cent. Ins. Co., 80 N. H. 552, 556; Pac. Mut. Ins. Co. v Van Fleet, 107 P. 1087.

less of any administrative interpretation of the law, which cannot change it.[8]

The opinion of the Circuit Court is sound upon every theory.

The legislative intention that the "proof" attaches to the motor vehicle itself is clear by P. L. 5191 which says it "extends to and covers" an owner's vehicle and only by such interpretation can the protection of the traveler on the public ways, which is the fundamental basis of these statutes, be secured. Wheeler v O'Connell, 297 Mass. 549, 552.

II.

THE COVERAGE OF AN INSURANCE POLICY IS NOT DIMINISHED BY STATUTE. THE STATUTE MAKES THE COVERAGE INCONTESTIBLE

Under Title II of its Brief Petitioner contends that the requirement for proof is absoulte, not conditional. In this we concur, but there is no statuary requirement that Proof of Financial Responsibility for one person shall be covered by the ***same insurer or by one policy,*** nor does the statute give the Commissioner the power to change the terms of the insurance contract, except as indicated in (a), (b), (c) and (d) of our Statement.

The statement in the first line of page 7 of Petitioner's Brief that the law defined the extent of Shelby coverage is unwarranted, for the pertinent Statute, P. L. 5193, does not prohibit the apportionment of a risk. The Commissioner merely has discretion to approve or disapprove of the coverage, as set forth in Title I hereof.

The case of Zabarsky v Employers F. Ins. Co., 97 Vt. 377, and other cases cited on p. 7 of Petitioner's Brief only hold that where the Statutes prescribe requirements for the insurance contract, the statutes control over the terms of the policy, but those cases have no application here, for as above indicated, the law

8 Couch on Ins. Law, Vol. 5 s. 1175g, n. 8 ; Boyle v Manufacturers L. Ins. Co., 96 N. J. L. 380; American Fid. Co. v Big Four Taxi Co., 111 W. Va. 462; Bosse v Wolverine Ins. Co., 190 Atl. 75; Roberts v Central Mut. Ins. Co., 2 N. E. (2nd) 132.

does not prescribe what moiety of a risk one insurer shall cover. The "proof" only requires evidence that the risk is covered to the satisfaction of the Commissioner. When the Commissioner accepted "proof" of the Farm Bureau as to the Ford coach, Plff's Ex. 4, that provided for $10,000 coverage for one accident it included J. Alan under the policy's omnibus terms and ***by the terms of the statute*** (P. L. 5190) ***the proof covered the car itself,*** at least when operated by the owner or a member of his family as we have argued under Title I (A) hereof. Shelby, by filing Deft's Ex. J did not enlarge the provisions of Auto1-S and Auto 5-S, for it expressly in Deft's Ex J, excluded from coverage motor vehicles owned by the "Named Assured," J. Alan, in Auto 1-S and owned by J. Arthur as a "Named Assured" under the main portion of Shelby policy.

The Financial Responsibility Law, so far as is here material, provided only that those portions of the statutes as are set forth in parts (a), (b), (c) and (d) of our Statement should be treated as written into the insurance contract, and the Certificate does not have the force Petitioner contends for at page 8 of its Brief.

III.

SHELBY'S CERTIFICATE OF COVERAGE DID NOT ENLARGE SHELBY'S LIABILITY UNDER AUTO 1-S

Under Title III of its Brief Petitioner takes the position that Deft's Ex. J, the proof of Financial Responsibility filed by Shelby, constituted an interpretation by the Commissioner of Motor Vehicles (Petitioner's Brief p 10) of P. L. 5193, and bases this argument in part upon the statement in its Brief (p. 9) as follows:—"He, (referring to J. Alan) was not named in its (Farm Bureau's) policy or in its (Farm Bureau's) Certificate of Responsibility of Arthur." The unsoundness of this argument is readily apparent, for the coverage of the Farm Bureau was ***extended to and covered the Ford coach by*** P. L. 5191, as well as by the omnibus coverage provisions of Farm Bureau policy. There was no need to specifically name J. Alan as an assured in this policy for the District Court found J. Alan was "driving the Ford coach with the permission of J. Arthur" when J. Alan "carelessly ran over and killed Violano" (R. 239). These facts

conclusively show that J. Alan was included within the protection of the Farm Bureau policy, just as much as though he was specifically named therein as an assured, furthermore, by P. L. 5191 it was provided that the proof "shall cover and extend to all motor vehicles owned by a person." Thus, it is clear that the coverage attached to the automobile itself when operated as found by the District Court.

The mere fact that the Commissioner provided for the coverage as to J. Alan by two certificates, one of which specifically covered the Ford coach, did not limit the coverage to the owner of the car, but the coverage still ***extended to and covered the Ford coach*** by P. L. 5191. In any event, the fact that the Commissioner was satisfied with the proof filed by J. Arthur and J. Alan did not constitute any adjudication that the Farm Bureau was covering J. Arthur only, for to do so would have placed the Commissioner in the position of changing a contract between the Farm Bureau and J. Arthur which he had no power to do. Deft's Ex. J is not susceptible of the construction contended for by the Petitioner, for by the terms of Deft's Ex J that certificate covers J. Alan when "driving any motor vehicle other than a motor vehicle owned in full or in part by the Named Assured" under Shelby policy 26418 and the "Named Assured" under the main Shelby policy is J. Arthur. J. Alan is an additional Named Assured under Auto 1-S and Farm Bureau's own argument defeats the conclusion for which it contends, for if there was any interpretation by the Commissioner by accepting this Certificate, then by that very interpretation he excluded a motor vehicle owned by J. Arthur as he is at least a Named Assured in the Shelby policy with J. Alan.

As pointed out in Title II par. 1, supra, the only limitations upon an insurer's power to contract are those mentioned under parts (a), (b), (c) and (d) of the Statement which limitations are treated as being written into the policy.

The intent of the parties as to the Farm Bureau coverage was subordinate to the provisions of P. L. 5191, by the terms of which statute and P. L. 5194, the ***insurance attached to the motor vehicle,*** Couch on Law Ins. Law, Vol. 5 s. 1175g, n. 8; Boyle v Manufacturers L. Ins. Co., 96 N. J. L. 380; Am. Fid. Co. v Big Four Taxi Co., 111 W. Va. 462, but Petitioner seeks to avoid the

effect of its own argument by claiming that the statute was changed by the Commissioner through the Certificate, Plff's Ex. 4. This argument is palpably unsound. The Commissioner lacked power so to do. Heath v Wallace, 138 U. S. 573.

IV.

THE DECISION GUARDS THE PUBLIC POLICY OF THE STATE, WHICH IS TO PROTECT PERSONS INJURED BY THE NEGLIGENT OPERATION OF AUTOMOBILES

Under Title IV of its Brief, Petitioner contends that the dedecision of the Circuit Court emasculates the Vermont Financial Responsibility Statute. This result would be accomplished if the Petitioner's contentions were sustained, for an injured person would be denied the coverage which the law provides by P. L. 5190 subd. I and III and which attaches to the motor vehicle by P. L. 5191, which says, the proof ***"shall cover and extend to all motor vehicles owned by a person,"*** for, to accept the Petitioner's contention would be to ***remove the $10,000. coverage*** which attached to the Ford coach under the Farm Bureau policy and ***substitute therefor the $5,000. coverage*** which is provided for by the Shelby policy, which coverage, as we have indicated above, should not attach even by the terms of Deft's Ex. J. There can be no question but that under riders Auto 1-S and Auto 5-S, Shelby and J. Arthur provided protection for J. Alan's operation of automobiles, other than those owned by J. Arthur. This is recognized by Deft's Ex. J, which excepts even in that proof the motor vehicles owned by the "Named Assureds," J. Arthur and J. Alan.

The contention that the damaged person is left uncertain as to liability to pay his damage is unsound, for injured persons can resort to the Farm Bureau policy as he is now doing, in the manner provided by law.

Even if the contentioner of the Petitioner were sound as to the interpretation of the Financial Responsibility Law, it would still be liable because it waived the forfeiture provisions as to "other insurance" by making the offers of settlement set forth

in the Record pp. 236 and 237, and in the manners set forth in Title G—1, 2, 3, 4 and 5, supra, thus waiving or being estopped to assert non-coverage if it had any right so to do in the first instance. This result is clearly brought about by the law whereby the Petitioner, having waived the forfeiture "is bound to treat the contract of insurance as though no forfeiture had occurred."[9]

We call attention to the fact that the Courts below did not feel it necessary to resort to consideration of the issue of waiver which took place in the various manners ponted out above in Title I, except as to waiver by offers of settlement (R. 236, 237).

To sustain the Petitioner's contention would be a travesty on justice for it would be permitted to avoid the very protection which it was paid for under its policy and to use the Statutes which was intended to protect an insured person for the purpose which were intended to protect an injured person, for the purpose of depriving such injured person of the protection which the Statutes afford him, and also permit the Petitioner to avoid a contract which the Statutes intended to make incontestable. The Petition should be denied.

Respectfully submitted,

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9 Cummings v Conn. Gen. L. Ins. Co., 102 Vt. 351, 360; Bates v German Comm. Acc. Co., 87 Vt. 128, 130; Beatty v Employers L. A. Corp., 106 Vt. 25, 33, 35 (8); Webster vs. State Mutual F. Ins. Co., 81 Vt. 75, 80.